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IN THE

Supreme Court of the United States

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF LATINO ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*

Amici curiae National Council of La Raza and other Latino organizations respectfully submit this brief pursuant to Rule 37.3 of this Court. The statements of interest of all *amici* appear in the Appendix to this brief.[1]

SUMMARY OF ARGUMENT

In this brief, *amici* adopt by reference the principal legal arguments that support the University's and Intervenors' positions, which are well addressed by the University, by the Intervenors, and by other *amici.* Consistent with the legal framework established by this Court, this brief addresses the scope of the University's interest in securing the educational benefits provided by increased representation of Latino students and in remedying the continuing effects of discrimination against Latinos within the public educational system, including the University itself.

Amici address two points. Part I considers the unique contributions of Latino students to the exchange of ideas, thoughts, and views on a university campus, an exchange central to the state's educational mission. Due to a variety of historical, legal, and societal factors, Latinos constitute a distinct group and share a common identity. This identity is shaped by several common (though not universal) characteristics, including a Spanish language tradition; underachievement as a group in the educational system; disproportionate concentration in lower-income labor/service sectors; the presence of a large immigrant population; and an enduring history of racial discrimination. Although each Latino's individual circumstances may differ, these characteristics—all prevalent within the Latino community

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1. This brief is filed with the consent of both petitioners and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, *amici* state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amici*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

in Michigan and nationwide—combine to create unique life experiences for Latino students. By virtue of being part of that community, Latino students possess unique, often personal, insights into a variety of topics that are central to a comprehensive and diverse college educational experience: language and cultural issues such as bilingual education and globalization; educational issues such as educational reform and equity; socioeconomic issues such as labor rights, class structures, and poverty; immigration issues such as immigrant rights and assimilation; and equality issues such as racial and ethnic discrimination in housing, voting, and employment.

Part II examines the history and current reality of discrimination against Latinos within the public educational system as a whole and the University in particular. The University draws upon a nationwide pool of students. Unfortunately, American public schools have systematically discriminated against Latinos in various ways, including the perpetuation of *de facto* and *de jure* segregation of Latinos; failure to provide adequate learning resources to Spanish-speaking students; and disproportionate tracking of Latino students into remedial and vocational classes. All these forms of discrimination have hindered the educational progress of Latino students, as reflected in their dismal record of educational attainment at both the secondary and postsecondary school levels. The University itself has also engaged both in active discrimination against Latino students through the misconduct of its faculty and staff and in passive discrimination through its failure to mitigate the hostile racial climate on campus. Further, the University utilizes certain admissions criteria (unrelated to merit) that have a clear discriminatory impact on Latino students and would further reduce the representation of Latino students absent the counterbalancing consideration of race. As a public educational institution, the University has both the ability and responsibility to remedy the continuing effects of this discrimination.

ARGUMENT

I. LATINO STUDENTS ARE IN A UNIQUE POSITION TO ENHANCE THE DIVERSITY OF IDEAS ON COLLEGE CAMPUSES IN FURTHERANCE OF THE UNIVERSITY'S EDUCATIONAL MISSION

This Part discusses the distinct and shared experience of members of the Latino community in the United States, and the unique perspective that Latino students can contribute to the diversity of academic and social exchange in furtherance of the University's educational mission.

A. Latinos Are a Unique and Distinct Group in the United States[2]

Despite having recently become the nation's largest minority group,[3] Latinos may appear to some observers to be a group of relative newcomers to this nation—largely indistinguishable from previous waves of immigrants from Europe. This perniciously ahistorical view has a policy corollary—that Latinos should be treated no differently from previous European immigrant groups and should be expected to overcome presumptively momentary spasms of anti-Latino sentiment without government assistance, and, in particular, without affirmative action. In all respects, this view ignores the history of Latinos as a distinct group and their unique position in contemporary American society.[4]

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2. A more complete discussion of Latinos as a distinct American ethnic group is included in the amicus brief filed by the Mexican American Legal Defense and Educational Fund ("MALDEF") on behalf of Latino organizations in *Grutter v. Bollinger, et al.* To avoid repetition, only a brief discussion is included here.

3. The United States Census Bureau estimates that, as of July 2001, 37 million Latinos lived in the United States, comprising thirteen percent of the population and slightly surpassing African Americans as the nation's largest minority group.

4. For example, although many Americans view the nation's two largest Latino subgroups—Mexican Americans and Puerto Ricans—as

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Latinos, whether immigrant or native-born, have long been subject to discrimination in the United States based upon their ethnicity.[5] As a result of this discrimination and numerous other factors (several of which are discussed *infra* in Part I.B), Latinos have forged a community with a unique, albeit varied, experience; one heavily influenced by the distinction of being Latino in the United States. This experience informs, in significant part, the viewpoints of Latinos. It is this dimension—the experience of being a member of the Latino community separate and apart from the individual economic and other circumstances of each Latino—that is worthy of consideration by admission officers in constructing a rich educational environment.[6]

B. Several Common Characteristics of Latino Students Add Diversity to the College Educational Experience

The shared group identity discussed above is shaped by several common (though certainly not universal) characteristics, including a Spanish language tradition; underachievement as a group in the educational system; disproportionate concentration of Latinos in lower-income labor/service sectors; the immigrant

(Cont'd)
recent immigrants, those two subgroups share an experience claimed only by African Americans and Native Americans – namely the forcible and involuntary introduction of the group into the United States.

5. Nearly a half century ago, in the same term as *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court recognized this history in *Hernandez v. Texas*, 347 U.S. 475 (1954), which held that Latinos should be viewed as a separate and distinct group for purposes of civil rights protections.

6. The recognition of a common identity is not, of course, intended to suggest that all Latinos share identical views. Rather, the common cultural experience of the Latino community has produced a great diversity of views within that community. This diversity of views underscores the need for greater numbers of Latino students on campuses to reflect the variety of views that can come from those with common ethnic roots.

experience; and a history of persistent and enduring racial discrimination. Although there are more direct proxies than the Latino classification for any particular characteristic, and although not all Latinos come from identical socio-economic or familial backgrounds, the factors listed above, in combination, provide a composite picture of the shared life experiences of members of the Latino community. In this section, we explore how and to what extent these characteristics affect the life experience of Latinos, and how that experience positions Latinos to make a unique contribution to the exchange of ideas on a university campus.

1. *The Spanish Language and its Cultural Influence*

Many Latinos can speak, read, and write Spanish with varying levels of proficiency. For numerous Latinos, Spanish remains the native tongue and their first language. According to the 2000 census, over 28,000,000 Americans (over ten percent of the United States population) speak Spanish in the home. *See* U.S. Census Bureau, *Census 2000 Summary File ("SF") 3*. Almost half of the Spanish-speaking population speaks English less than "very well." *See id.* Thus, even for prospective Latino students who are fluent in English only, English is a second language for many family members, thus affecting their experience and perspective.[7]

The widespread knowledge of Spanish among Latinos has several implications for the educational experience of all students. First, language-related issues have come to the forefront of political and academic debate in recent years. Such issues include the designation of English as the official

7. Although the University could award extra points to all students who speak a foreign language—surely a legitimate consideration—the fact remains that a Latino coming from a community in which Spanish is a unifying trait adds an independently valuable cultural perspective on the importance of the Spanish language to the broader Latino community, apart from the value of the language skill itself.

language,[8] "English-only" workplace rules,[9] bilingual education,[10] and multilingual voting ballots. Because these issues have been framed largely with respect to the Latino population, Latinos have a special perspective—regardless of whether a particular Latino student speaks Spanish herself or would favor or disfavor such rules—to contribute to discussions of these issues.

8. As of 1999, 24 states had made English their official language, and 14 states considered such bills that year. Some of these laws also limit or bar the government's provision of services in languages other than English. The most restrictive of these was Arizona's Proposition 106, which would have imposed legal sanctions for noncompliance but was struck down by the Arizona Supreme Court. *See* R. Reese, *Language Diversity and the Politics of the English Only Movement in the U.S.*, Paper Presentation: 34th World Congress of the International Institute of Sociology, Tel Aviv, Israel (July 10-16, 1999). In 1996, the House of Representatives passed a bill declaring English the official language of the government of the United States. *See* H.R. 123, 105th Congress, 1st session (1996). However, the Senate did not act on the bill, rendering it void. *See* Reese, *supra*.

9. Some companies have begun to implement rules that prohibit workers from speaking languages other than English at the workplace. Although the EEOC states that such rules may violate Title VII of the Civil Rights Act unless shown to be a "business necessity," courts have generally been reluctant to strike them down. *See* Reese, *supra* (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *Long v. First Union Corp of Virg.*, 86 F.3d 1151 (4th Cir. 1996)).

10. The issue of bilingual education is not new. Both Texas and California banned classroom instruction in Spanish during the 1850s, despite the fact that many Latino children knew only Spanish. *See* Tijerina Expert Rpt., *infra*, at 24; Clara Mercedes Piloto, *Stilled Voices in America's Educational System*, 93 McNair Journal (University of California, Berkeley). More recently, despite court intervention to require bilingual educational services, *see infra* Part II.B.2, California, Arizona, and Massachusetts have all passed ballot initiatives to restrict bilingual education. Indeed, the heated campaign for the California initiative was expressly targeted at Spanish-speaking students. *See* George Martinez & Kevin Johnson, *Discrimination by Proxy: The Case of Proposition 227 and the Ban of Bilingual Education*, 33 U.C. Davis L. Rev. 1227 (2000).

Second, Spanish-speaking students or students accustomed to interacting with a Spanish-speaking community add to the language and cultural diversity of the campus. Such students can serve as a language and cultural resource to their classmates learning Spanish—providing insight into local customs and dialects—in preparation for study abroad or for a career in an increasingly international economy. As one education policy analyst has written, "Here is a resource to help schools become truly global in outlook and in the ways they prepare students. . . . [S]chools could build on the skills and culture that Hispanic[s] bring to school with them in order to make all students both bilingual and more successful learners." Anne C. Lewis, *Growing Hispanic Enrollments: Challenge and Opportunity*, 80 Phi Delta Kappan 3-4 (1998).

Third, because many Spanish-speaking communities are underserved, Spanish language ability and sensitivity (and thus the presence of Latino students) is relevant to enhancing a university's community service programs.[11] The improvement of these programs provides numerous benefits to the University as a whole, as students experience the personal and professional benefit that comes from serving those less fortunate.

2. *Educational Attainment*

The Latino community has attained lower levels of education than any other major racial or ethnic group in the United States. The statistics are alarming, if not shameful.

11. In a study of 19,915 college students, Latino students tended to increase their commitment to activism over the course of their college years (defined as a composite measure of seven items reflecting the importance of getting involved in one's community and working for political and social change), whereas white students tended to decrease their commitment to activism over the same time period. *See* Lori J. Vogelgesang, *The Development of Civic Values and Skills: An Analysis by Race, Gender and Social Class*, *available at* http:/www.diversityweb.org/Digest/Sp.Sm00/civic.html. The study also noted that those white students who participated in more cross-racial interactions increase their commitment to activism, yet another benefit of ethnic/racial diversity. *See id.*

Nationally, a striking 27.3% of Latinos over the age of twenty-five have less than a ninth grade education; in comparison, just 4.2% of whites suffer such low education attainment. *See* U.S. Census Bureau, *Current Population Reports: The Hispanic Population in the United States* at 4-5 (March 2000). In addition, only 57.0% of Latinos over the age of twenty-five have graduated high school, compared to 88.4% of whites. *See id.* As one might expect, these trends carry over into higher education. Just 10.6% of Latinos hold bachelor degrees, compared to 28.1% of whites. *See id.* at 5. In addition, only 2.2% of Latinos hold masters degrees, 0.7% hold professional degrees, and 0.5% h ve doctorate degrees, whereas the white population has attain d each of these credentials at almost three times those rates. *See* U.S. Census Bureau, Current Population Survey (March 2000) (unpublished data).

The numbers for the Latino population in Michigan, the home state for the majority of the University's students, are not much better. As of 2000, 19.2% of Latinos in Michigan over the age of twenty-five had less than a ninth grade education, compared to 5.7% of blacks and 4.1% of whites. *See* U.S. Census Bureau, *SF 3*, *supra* (figures compiled by Dr. Robert Aponte, co-author of Robert Aponte & Marcelo E. Siles, *Michigan's Hispanics: A Socio-Economic Profile* (JSRI 1994) (analyzing these same indicators based on 1990 census data)). In addition, only 62.3% of Latinos statewide graduated high school, compared to 74.1% of blacks and 85.3% of whites, and just 12.9% of Michigan Latinos had attained bachelor degrees, compared to 22.6% of whites. *See id.*

In light of this educational gap in the Latino community, Latino students who qualify for college or postgraduate education possess unique perspectives and insights into issues of educational reform, educational equity, and other related topics (e.g. access to information on higher education, school vouchers, funding schemes, standardized testing, charter schools). Discussions of how to narrow the education gap and why the current educational system is failing certain groups

require a diversity of experiences and perspectives. Because many students grapple with these issues for the first time in college or law school, the Latino perspective—often grounded in first-hand experience and observation—is integral to ensuring a comprehensive and nuanced dialogue.

3. *Employment and Economic Profile*

Although Latinos show strong levels of labor force participation—indeed, higher than both whites and blacks—Latinos, on average, are unemployed at roughly twice the rate of whites. *See, e.g.*, U.S. Census Bureau, *The Hispanic Population in the United States*, *supra*, at 5. In addition, among those employed, Latinos are more likely than any other racial or ethnic group to be in low-wage service sector jobs—including food preparation, personal service, cleaning/maintenance jobs—and least likely to be in high-paying managerial positions and professional occupations. *See id.* For example, 19.4% of Latinos toil in the service sector, compared to just 11.8% of whites, and only 14.0% of Latinos work in professional positions, compared to 33.2% percent of whites. *See id.* The story is much the same in Michigan, where unemployment rates of Latino males have been almost double those of white males, and where a majority of employed Latinos work in low-wage manufacturing, service, and retail trade jobs.[12] *See* Aponte & Siles, *supra*, at 5-7.

As a result of this skewed job distribution, Latinos trail all other racial and ethnic groups in benefits and income levels. Even though two-parent working families are more prevalent among Latinos than other groups, only 28.1% of Latino workers had employer-provided pension plans in 1999, compared to 41.6% of African-Americans and 46.6% of whites. *See* NCLR, *Beyond the Census: Hispanics and an American Agenda*, at 19 (August 2001) (citing March 1999 Current Population Survey). Similarly, Latino families are the least likely to have health

12. The number of Latinos in agricultural jobs was artificially depressed because of the seasonal nature of those jobs and the timing of the census survey. *See* Aponte & Siles, *supra*, at 7.

insurance benefits. In 1999, only 43.4% of Latinos had employer-based health coverage, compared to 52.0% of blacks and 68.4% of whites. *See id.* at 22 (citing March 2000 Current Population Survey). Latinos also earn the lowest annual per capita income among all major racial and ethnic groups at just $13,003, compared to $14,953 for blacks and $26,134 for whites. *See* NCLR, *Hispanic Income Fact Sheet* (November 2002) (citing U.S. Census Bureau, *Money Income in the United States: 2001*). Furthermore, the median household income for Latino married-couple families in 1999 was only $40,614, whereas black and white families enjoyed median incomes of $51,514 and $63,862, respectively. *See id.* Similarly, in Michigan, the median household income for Latinos was $38,481, lagging behind whites by well over $8,000. *See* U.S. Census Bureau, *SF 3*, *supra* (figures compiled by Dr. Aponte).

Not surprisingly, given these benefit and income figures, Latinos trail whites in net asset accumulation. In fact, in 1998, Latino families held just four percent of the wealth of white families. *See* NCLR, *Beyond the Census*, *supra*, at 19. Moreover, 22.8% of Latinos nationwide—including 30.3% of Latino children—live in poverty, compared to only 7.7% of whites; and 19.2% of Latinos in Michigan—including 21.7% of Latino children—live in poverty, compared to 7.4% of whites. *See* U.S. Census Bureau, *The Hispanic Population in the United States*, *supra*, at 6; U.S. Census Bureau, *SF 3*, *supra* (figures compiled by Dr. Aponte).

Given this dire employment and economic profile, Latinos as a group share a community experience of struggle—whether they are among the bulk of Latinos in poverty or among the more fortunate.[13] As a result, Latino students are likely to have

13. On a related note, the shift to an admissions policy focusing on socio-economic status instead of race is problematic. Often with no more than one generation out of poverty, low levels of accumulated wealth, and weak educational backgrounds, many children of the Latino middle class are not sufficiently prepared to compete with their middle-
(Cont'd)

personal insights into a range of employment and economic issues, such as employment law, class structures, social programs and health care reform. These personal insights will often lead to viewpoints that are distinct from those of the majority of American society—viewpoints that are integral to a rich and complete classroom discussion. Given the importance of these difficult issues to the future of the country, it is appropriate for the state to take measures to ensure that college and law students be presented with these perspectives.

4. *Immigration and Citizenship*

Although the majority of Latinos in the United States are native born and a significant number are second- or third-generation United States citizens, Latinos are unique among contemporary American ethnic groups, in part, because a large percentage of their population is foreign born. According to the 2000 census, nearly forty percent of the Latino population is foreign born, and Latinos make up nearly half of the total foreign-born population of the United States. U.S. Census Bureau, *Profile of the Foreign Born Population in the United States: 2000* at 24 (issued Dec. 2001).[14] By comparison, less than four percent of the white population is foreign born. *Id.* Furthermore, whereas approximately seven percent of the white population has at least one parent who is foreign born, nearly thirty percent of the Latino population falls into that category.[15] *Id.* at 25. As a

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class white peers. *See* Patricia Gandara, *Latinos and Higher Education: A California Imperative, Chicano/Latino Public Policy Seminar and Legislative Day* – Proceedings (Feb. 1-2, 2000).

14. This data excludes the undocumented immigrant population, which is estimated to be well over five million persons and primarily Latino. *See* U.S. Dep't. of Justice, *1997 Statistical Yearbook of the Immigration and Naturalization Service* (Issued Oct. 1999) at 199. This data also excludes Puerto Ricans, who were granted statutory United States citizenship in 1917.

15. In fact, sixty-five percent of Latino students in elementary and high school have at least one foreign-born parent. U.S. Census Bureau, *Current Population Reports: School Enrollment in the United States – Social and Economic Characteristics of Students* (issued Oct. 1999).

result, the majority of Latinos in the United States have personal experience with issues of immigration, either through their own life experiences or those of a parent.

Latinos are also unique among American ethnic groups in terms of the pattern of their migration to the United States. Unlike the typical model of European immigration to America, which was characterized by a short wave of large-scale immigration, Latino immigration has continued at a high level throughout the twentieth century. This has produced dramatic changes in the demographics of American society. In fact, as stated *supra*, Latinos have now surpassed African Americans as the largest minority group in the United States, and, for the first time since the nineteenth century, constitute the majority of the children born in the State of California. *See* Genaro C. Armas, *Hispanics Now Outnumber Blacks in U.S.*, Associated Press, January 22, 2003; *Latino Majority Arrives – Among State's Babies*, Los Angeles Times, February 6, 2003, at A1. Moreover, immigration has transformed the Latino community itself. Whereas in 1970 over eighty percent of American residents of Mexican descent were born in the United States, recent data indicates that figure is now less than forty percent of the Mexican descent population. David G. Gutierrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* 183 (University of California Press, 1995); Pew Hispanic Center/Henry J. Kaiser Family Foundation, *2002 National Survey of Latinos* at Table 1.16 (issued Dec. 2002).[16] Thus, unlike European immigrants, who over time were exposed to smaller and smaller numbers of persons who had immigrated from their country of origin, American-born Latinos have

16. These numbers are also true of the Latino population as a whole, although to a lesser degree. Whereas nearly forty percent of the present Latino population of the United States is foreign born (*supra*), in 1970, less than twenty percent of the Latino population was born outside the United States. U.S. Census Bureau, *Race and Hispanic Origin of the Population by Nativity: 1850 to 1990* (Issued March 2001).

continued to interact with Latino immigrants, thereby reinforcing ties based on family, language, history, and culture.[17]

The personal experience of Latinos with immigration allows them to bring a unique perspective to the classroom. Discussions regarding legal distinctions between citizens and non-citizens, the rights of immigrants generally, and issues of assimilation and Americanization are enhanced by the presence of Latino students. This is particularly true in light of debates—following the September 2001 terrorist attacks—about balancing an increasingly open border with the need to protect homeland security. Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 Tex. Hisp. J. L. & Pol'y. 37 (2002). As to each of the issues listed above, as well as numerous others, the presence of a critical mass of Latino students will improve the education of other students by adding to the diversity of the views expressed in the classroom and providing personal familiarity with issues of immigration, naturalization, and Americanization in the twenty-first century by persons whose culture has been shaped by a unique immigration experience.

5. *Racial Discrimination*

As is the case with African Americans and Native Americans, Latinos have suffered a long history of racial discrimination in the United States. For Mexican Americans, that history stretches back to the nineteenth century, when they were systematically dispossessed of their land holdings by incoming Anglo settlers. Expert Report of Dr. Andres Tijerina ("Tijerina Expert Rpt.") at 6 (October 11, 2001) (filed in *Balderas v. Texas*, Civil Action No. 6:01 CV158 (E.D. Tex. 2001)). In addition, for both Mexican Americans and other

17. Conversely, it is undoubtedly true that American-born Latinos and America itself has had a strong influence on Latino immigrants. In fact, of those Latinos who immigrated to the United States prior to 1970, approximately seventy-five percent have become American citizens. NCLR, *The Hispanic Population of the United States, supra,* at 3.

Latino groups, racial discrimination has been and continues to be a persistent element of the American experience in the twentieth and twenty-first centuries.

Racial discrimination against Latinos—though present in many elements of society—has been epitomized by the enforced segregation of Latinos from white Americans in housing, as well as by other forms of discrimination against Latinos in voting, employment, and the criminal justice system. The segregation of Latinos in education is discussed in detail, *infra* Part II.B.1. The residential segregation of Mexican Americans in the Southwest was accomplished primarily through the use of racially restrictive housing covenants that continued from the early 1900s to the late 1970s. Tijerina Expert Rpt. at 23. For example, in the County of Los Angeles during the mid-1940s, approximately eighty percent of municipalities employed restrictive housing covenants that excluded Latinos, African Americans and Asians. Declaration of Dr. Albert M. Camarillo ("Camarillo Decl.") at 8 (October 12, 2001) (filed in *Ruiz v. Santa Maria*, CV 92-4879 LGB (Shx) (C.D. Cal. 1992)). The separate and unequal status of Latinos in housing was replicated in public spaces. In both Texas and California, Latinos were denied service in restaurants, swimming pools, barber shops and theaters. Camarillo Decl. ¶11; Tijerina Expert Rpt. at 23. In fact, so as to avoid any confusion, Latinos in both Texas and California were often greeted with signs stating "No Negroes or Mexicans Allowed" or "White Trade Only." Camarillo Decl. ¶11. Similar, though subtler, racial discrimination against Latinos remains evident today. For example, despite the fact that the Latino population has grown dramatically in recent years, Latinos are now more segregated from white Americans than at any time in the recent past. NCLR, *Beyond the Census, supra*, at 9. Whereas the average white American lives in a neighborhood that is approximately six percent Latino,

the average Latino resides in a neighborhood that is over forty percent Latino. *Id.*[18]

The second-class status of Latinos also extended to the area of voting rights. During the early 1900s, Latinos in Texas were discouraged or precluded from voting through the use of poll taxes, the elimination of interpreters at the polls, and the institution of a "White Man's Primary" by the Democratic Party, which as one newspaper reported, "absolutely eliminate[d] the Mexican vote as a factor in nominating county candidates . . ." Tijerina Expert Rpt. at 14. Many of these practices were replicated in California, where the Latino vote was rendered irrelevant through racial gerrymandering and the use of at-large elections for city positions. Expert Report of Dr. Albert Camarillo ("Camarillo Expert Rpt.") at 9-10 (July 1, 2000) (filed in *Ruiz v. Santa Maria*, CV 92-4879 LGB (Shx) (C.D. Cal. 1992)); Expert Report of Dr. Ricardo Romo ("Romo Expert Rpt.") at 36 (March 6, 1994) (filed in *Ruiz v. Santa Maria*, CV 92-4879 LGB (Shx) (C.D. Cal. 1992)). As a result, despite the presence of a large Latino population in Los Angeles throughout the twentieth century, only one Latino was elected to the Los Angeles City Council prior to the mid-1980s. Camarillo Expert Rpt. at 11.

Latinos have also suffered racial discrimination in the area of employment. In the American Southwest, Anglo stereotypes of Latinos often limited the latter to low-wage, agricultural labor repugnant to white Americans. Romo Expert Rpt. at 23-30. In addition, efforts by Latinos to unionize or otherwise advocate for improved labor conditions were often met with violence on the part of local Anglo residents. *Id.* Unfortunately, several recent studies indicate that racial discrimination against

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18. The increasing segregation of Latinos is explained, in part, by a recent report prepared for the Department of Housing and Urban Development, which indicates that discrimination against Latinos in the housing market rose during the 1990s. The Urban Institute, *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* at iii (November 2002).

Latinos in employment is not a remnant of American history. International Labour Organization, *Discrimination Against Racial/Ethnic Minorities in Access to Employment in the United States: Empirical Findings From Situation Testing* at 4.51, *available at* http://www.ilo.org/public/english/protection/migrant/papers/usempir/index.html (finding that discrimination against Latinos and African Americans in employment remained prevalent). For example, even after accounting for differences in education, experience and other job-relevant qualifications, racial and ethnic minorities, including Latinos, remain under-represented in higher-level occupations, do not receive the same wages as non-minorities for performing the same work and experience higher rates of job dismissal. *Id.* at 2.2.1.

Current statistics from the criminal justice system are even more disturbing. Whereas Latinos constitute approximately twelve percent of the nation's population, they comprise nearly thirty percent of the federal prison population. National Council of La Raza, *Latinos and the Federal Criminal Justice System* (July 2002). This is particularly troublesome given that studies show that Latinos and other ethnic/racial minorities continue to be targeted by local police due to racial profiling. Leadership Conference on Civil Rights, *Justice on Trial: Racial Disparities in the American Criminal Justice System.*[19]

The experience of racial discrimination provides Latino students with a unique perspective in numerous classroom settings. For example, Latino students are likely to provide

19. The report cites two particularly poignant examples of the racial profiling of Latinos. First, a Louisiana State Police Department training film specifically encouraged officers to initiate pretextual traffic stops against Latinos. *Id.* at 2. Second, a December 1999 report by the New York Attorney General found that African Americans and Latinos made up over eighty-four percent of those targeted for "stop and frisk" pat downs by New York Police Department officers, despite the fact that minorities were less than fifty percent of the city population, and stops of minorities were less likely to yield arrests that those of white New Yorkers. *Id.* at 4-5; Office of the Att'y. Gen. of N.Y., *The New York City Police Department's "Stop and Frisk" Practices* at Table II.A.3 (1999).

distinct contributions to discussions of race in American history, the history of American colonialism, voting rights and segregation. In addition, Latino students may bring unique perspectives to discussions of various "hot button" issues, such as bilingual education, racial profiling, the role of the mass media in perpetuating ethnic stereotypes, the death penalty, and hate crime legislation. As to each of these issues, Latino students will increase the variety of the viewpoints expressed at the University and thereby the vitality and diversity of the academic debate.

II. THE UNIVERSITY OF MICHIGAN HAS A COMPELLING INTEREST IN REMEDYING THE CONTINUING EFFECTS OF DISCRIMINATION AGAINST LATINOS

A. Public Education Bears A Special Responsibility in Eradicating Societal Discrimination

Among the most frequently excerpted portions of this Court's unanimous opinion in *Brown v. Board of Education* is the paragraph that begins by recognizing that "[t]oday, education is perhaps the most important function of state and local governments." 347 U.S. 483, 493 (1954). Chief Justice Earl Warren's eloquent description remains as true today as it was then. As the Court has stated, education plays a vital role in "'inculcating fundamental values necessary to the maintenance of a democratic political system,'" as well as in "provid[ing] the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)).

Education's "fundamental role in maintaining the fabric of our society," *id.*, embraces both a capability and an obligation to address fundamental social issues, with respect to both the individual and the community as a whole. As to the issue of general societal discrimination, public education is implicated in two ways. First, public education bears a responsibility for the continued existence of societal discrimination because it

reflects, at minimum, a failure to inculcate successfully one of our nation's central ideals—equal treatment regardless of race. Second, state-run educational institutions are uniquely situated to take steps to eliminate societal discrimination and to promote the equality that could flourish in its absence.

The teaching of anti-discrimination values in education necessarily requires the presence of persons who have been and remain the frequent targets of societal discrimination, such as Latinos. Through academic discourse and extracurricular experience, the presence of racial/ethnic diversity plays a critical role in fulfilling education's fundamental mission of "transmitting 'the values on which our society rests.'" *Plyler*, 457 U.S. at 221 (quoting *Ambach*, 441 U.S. at 77). Consequently, in determining whether an individual minority student should be admitted, public institutions of higher education take an important step toward redressing discrimination and toward ensuring its future demise. Failure to take this step misses a critical opportunity and undermines the educational mission. As this Court has stated, "by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority." *Plyler*, 457 U.S. at 222. This conclusion applies with equal vigor to higher education today. By increasing minority access to the most-esteemed professions, the state strikes a strong blow against future societal discrimination.

B. Latinos Encounter Discrimination at All Levels of the American Public Educational System

Even if some question remains as to the scope of a public educational institution's responsibility to address societal discrimination, there should not be any question as to its ability to rectify the effects of discrimination within the public educational system itself. This Court has repeatedly held that race-conscious affirmative action programs are permissible where the government actor has a "strong basis in evidence" for its conclusion that remedial action is necessary. *City of*

Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). The law is also clear that a public actor's remedial interest encompasses the power not only to remedy the effects of its own past discrimination, but also to act race-consciously to avoid the perpetuation of discrimination caused by other public or private entities. *See id.* at 492. Therefore, the University of Michigan should have the authority to eradicate the effects of discrimination within the school systems that fall within its "jurisdiction," or potential pool of students. Because the University draws from a national pool of students, discrimination within school systems nationwide may have a bearing on the equal protection inquiry. *See* The Princeton Review, University of Michigan-Ann Arbor, Student Body Profile, *available at* http://www.princetonreview.com; University of Michigan Law School, Prospective Students: Admissions, *available at* http://www.law.umich.edu/Prospectivestudents/admissions (over 30% of the University's undergraduate student body and over 70% of the Law School's students are from outside Michigan). Accordingly, in this section, we chronicle the history and current reality of discrimination against Latinos in public education in the United States.

1. *School Segregation*

As a result of both *de facto* and *de jure* segregation, Latino students are the most segregated minority group in contemporary American public education. *See* Erica Frankenberg *et al.*, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, The Civil Rights Project, Harvard University, at 4, 32-33 (2003) (hereinafter, "Harvard Study"); Jack M. Balkin, *What Brown v. Board of Education Should Have Said*, 6 (2001). Latinos have been segregated from whites in public schools largely as a result of the *de jure* residential segregation practices documented *supra* in Part I.A.5. However, school officials and their policies have also, as a matter of state authority, ensured segregation by establishing the separate education of Latinos. *See, e.g.*, Carlos M. Alcala & Jorge C. Rangel, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 Harv.

De Jure Segregation of Chicanos in Texas Schools, 7 Harv. C.R.-C.L. L. Rev. 307 (1972).

Although this Court recognized Latinos as a group for purposes of civil rights protection under the Fourteenth Amendment in 1954 in *Hernandez v. Texas*, efforts to desegregate Latinos did not achieve the same level of success as efforts to desegregate African Americans throughout much of the civil rights era.[20] *See* Harvard Study, at 19; Montoya, *supra*, at 165-70. Moreover, in the aftermath of *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that school district violated Title VI of the 1964 Civil Rights Act and discriminated on the basis of race and national origin because its failure to provide remedial English instruction to non-English-speaking students denied them a "meaningful opportunity to participate in the educational program"), court-ordered remedies did not focus on the rights of Latinos in the same manner as other victims of discrimination, but rather tended to focus on the enforcement of orders providing for bilingual education. *See* Harvard Study, at 20 & n.75.

Despite the history of legal battles, Latino students today are the most segregated minority group in the United States, with steadily rising rates of segregation. *See* Harvard Study, at 4, 32-33; Balkin, *supra,* at 6 ("The present tendency toward segregation of Latinos is, if anything, even more pronounced than that with respect to blacks."). Currently, 76.3% of Latinos attend predominantly minority schools, 37.4% of Latinos attend 90-100% minority schools, and 10.8% attend 99-100% minority schools. *See* Harvard Study, at 28. In stark contrast, 10.8% of whites attend predominantly minority schools, just 0.7% attend 90-100% minority schools, and just 0.03% attend 99-100% minority schools. *See id.* at 28. The average Latino student goes to school where less than thirty percent of the school population

20. Indeed, this Court did not explicitly recognize the right to school desegregation of Latinos alongside African Americans until 1973, *see Keyes v. School District No. 1*, 413 U.S. 189 (1973) (addressing segregation in the Denver school system), nearly two decades after its historic decision in *Brown v. Board of Education*.

is white, and the percent poor (44%) is more than twice that in a white student's school (19%). *See id.* at 35. This trend is reflected in Michigan, which ranks near the top third of most segregated states for Latino students, as measured by the percentage of those students in 90-100% minority schools. *See id.* at 50-52.

2. *Language-Based Discrimination and Barriers*

Language barriers, perpetuated both through unlawful state practices and through less direct means, continue to hurt Latino students. The history of language-based discrimination against Latinos in education dates back to the 1800s. *See supra* note 10. Starting in the 1970s, courts occasionally intervened to prevent students from being denied a meaningful opportunity for education on the basis of language. *See, e.g., Lau v. Nichols*, *supra*; *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971) (ordering bilingual/bicultural education to prevent segregation of Mexican Americans). Nevertheless, subtler forms of language discrimination have persisted on local levels. *See, e.g.*, Lewis, *supra* at 3-4 (school districts forbidding Latino students to speak Spanish on the playground and punishing those who did); Heriberto Godina, *The Violation of Mexican American Students' Education Rights: A Midwestern Ethnography*, 2 J. of Gender Race & Just. 387, 398 (1999) (informal school policy did not permit students to speak Spanish). The new movement—largely directed at Latinos—is not so subtle, and has succeeded in restricting access to bilingual education in several states. *See supra* note 10. Regardless of the merits of this movement, few, if any, school districts have adopted effective alternatives to bilingual education to prevent Spanish-speaking children from being left behind.

In addition, the language, cultural, and socioeconomic divide between school personnel and the Latino community limits detection of discrimination and often precludes effective participation by Latino parents in their children's educations. "The gulf between parents of color and schools remains especially wide, separated by legacies of racism, deficit thinking,

and mutual distrust. . . . [Latino] parents and their children not only face more institutional barriers, such as discriminatory tracking, but also have fewer resources for overcoming them, such as high status cultural and social capital." Susan Auerbach, *"Why Do They Give the Good Classes to Some and Not to Others?" Latino Parent Narratives of Struggle in a College Access Program*, 104 Teachers College Record 1369, 1370-72 (2002) (examining struggles of Latino parents and stories of bureaucratic rebuff in their encounters with school staff); *see also* Godina, *supra*, at 391 ("[T]he lack of communication between the Mexicano parents and school personnel contributed to their children's marginalization."). A Michigan State University study of migrant Latino children in Michigan found similar barriers between school and home. *See* Maria Teresa Tatto, et al., *The Education of Migrant Children in Michigan: A Policy Analysis Report*, Latino Studies Series Occasional Paper No. 72, at 10, 15-20 (November 2000).

3. *Tracking*

Many school districts have engaged in discriminatory tracking—also known as "ability grouping"—in a manner that diverts Latino students into remedial or vocational classes, with the natural consequence of limiting opportunities for academic success. Though a more subtle form of discrimination than outright segregation, tracking of Latino students into lower-level curricula is not a new phenomenon. *See* Tijerina Expert Rpt. at 26-27 (noting that since the 1920s, Mexican American students were put into "developmental" classes, ostensibly because they needed special attention). Numerous studies also document contemporary evidence of improper tracking of Latino students. *See, e.g., Godina, supra*, at 399 (finding that most Mexican-American students were slotted into low-track classes in a segregated setting); Pamela Anne Quiroz, *The Silencing of the Lambs: How Latino Students Lose Their Voice in School*, Working Paper No. 31, at 9 (JSRI 1997) (noting the placement of Latino students into low ability tracks); U.S. Dept of

Education, *The Condition of Education* 11 (1995) (reporting that Latino students are significantly less likely than their white classmates to have taken the core college preparatory curriculum). In fact, one study of migrant Latino students in Michigan faulted the practice of tracking in that state as well. *See* Tatto *et al.*, *supra*, at 14. In addition, many believe that these practices contribute to the negative educational experience of Latino students, such that only the most resilient students survive the path and graduate. *See* Quiroz, *supra*, at 9; Godina, *supra*, at 399 (citing T. Falbo, *Latino Youth and High-School Graduation*, American Psychological Association (1996)).[21]

4. *Obstacles to Completion of Higher Education*

Those Latino students who successfully overcome school-administered obstacles to graduate high school face further hurdles on the path to higher education. Related to curriculum-based tracking, teachers and counselors disproportionately channel Latino students into two-year colleges, where they fall prey to the high attrition rates prevalent in those institutions. *See* David Erlach, *Hispanics and Higher Education: Multicultural Myopia*, 75 J. of Educ. for Bus. 283 (May-June 2000). Approximately half of Latino college enrollment is in two-year colleges (compared to just thirty percent of black and white undergraduates), and only twenty-seven percent of Latino students transfer from two-year to four-year schools. *See* Richard Fry, *Latinos in Higher Education: Many Enroll, Too Few Graduate*, at 6 (Pew Hispanic Center 2002); Michele N-K Collison, *For Hispanics, Demographic Imperative Drives Educational Mandate*, 16 Black Issues in Higher Educ. 56 (1999). As a result, with the exception of community colleges, Latinos are underrepresented at all levels of higher education,

21. The statistics are consistent with this observation, as the high school dropout rate for Latinos (27.8%) aged 16 to 24 far outpaces that of blacks (13.1%) and whites (6.9%). *See* U.S. Dept of Education, *The Condition of Education* 164 (2002) (citing U.S. Census Bureau, Current Population Survey (October 2000)).

including four-year colleges, masters' programs, professional degree programs, and Ph.D programs. *See* U.S. Dept of Education, National Center for Education Statistics, *Fall Enrollment in Colleges and Universities Survey* (Table 207) (2000) (in four-year colleges, only 6.6% of students are Latino,[22] while 11.0% are African American and 75.2% are white); U.S. Dept of Education, National Center for Education Statistics, *National Postsecondary Student Aid Study* (2000) (only 7.2% of master's degree students, 5.1% of first-professional degree students, and 6.4% of doctoral students are Latino). Thus, as a practical matter, there exists in the United States a two-tiered higher educational system in which Latino youth continue to be directed toward lower status community colleges.

Recent statewide measures limiting the use of race in college and graduate school admissions have only exacerbated this two-tiered system. In California, for example, there has been a measurable erosion of access to higher education for Latinos, especially at the more prestigious campuses in the system. The premier public schools of higher education in that state, U.C. Berkeley and UCLA, both experienced precipitous declines in new Latino enrollees, falling from 14.5% and 15.8% in 1997 to 7.5% and 11.0% in 1998, respectively. This "cascading" effect—the movement of less competitive eligible students to less sought-after campuses—has disproportionately impacted Latino students. *See* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project, Harvard University, at 50 (February 2003);[23] Gandara, *supra*.

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22. The disproportionate level of Latino representation is striking given that Latinos constitute fifteen percent of the total college-age population. *See* U.S. Census Bureau, *Current Population Survey* (March 2000) (Table 9).

23. As this study indicates, the percentage plans adopted by California, Texas and Florida have not been as effective as the race-conscious admissions policies previously used by those states in securing a critical mass of minority students at the most prestigious state universities. *See id.* at 45-50.

C. Latino Students Have Suffered and Continue to Suffer Discrimination at the University of Michigan

The most direct remedial justification for the University's current admissions program is the University's own role in discrimination against Latinos and other racial minorities. The long history of University-sanctioned discrimination against African-Americans by administrators and other students, resulting in the continued underrepresentation of such students, is well documented in the Intervenors' brief. We focus here on the more recent history of discrimination against Latinos at the University.

1. *Past and Present Discrimination on the University Campus*

In 1968, *after* the University instituted its "Opportunity Program" to increase enrollment of underrepresented minorities, there were still only thirty "Spanish" students out of 32,261 on campus, comprising a mere 0.1% of the University's student body. *See* Expert Report of James D. Anderson, at 15 (filed with district court). Thereafter, Latino enrollment, measured by Spanish-sounding surnames, rose only incrementally to 0.2% in 1970, to 0.6% in 1972, and to 1.7% in 1984. *See id.* at 25, 43. These low numbers reflect the fact that the University lacked the personnel, knowledge, and awareness to recruit Latino students. *See id.* at 17. According to the Chicano recruiter for the University's Opportunity Program, there were no Chicano staff persons in the University, and a lack of communication between the University and the Chicano community hampered recruitment efforts. *See id.* at 28. Furthermore, there were virtually no efforts to establish contacts with principals, counselors, teachers, and social workers who worked with large numbers of college-bound Latino students or to gather systematic data on Latino high school students to permit strategic recruitment. *See id.* Latinos were thus excluded from the University's concept of minority, such that "[b]rown people could have no place in [the University's] bi-racial universe."

Id. In fact, it was not until several years after implementation of the 1987 Michigan Mandate—the University's policy to address the issues affecting underrepresented minorities—that Latino enrollment climbed once again, reaching 4.6% by 1995. *See id.* at 74.

Despite recent gains in Latino enrollment, Latino students today continue to encounter discrimination on the University campus in various forms. In one particularly revealing episode, a white Spanish professor taught his class the racially offensive terms of "wetback" and "Mojado," which one Mexican-American student deemed "equivalent to the 'N' word for a black person." *See* Deposition of Diego Bernal ("Bernal Dep.") (LSA Class of 1999 and current graduate/law student at the University), at 20-21 (filed with district court). Even after being informed of its inappropriate usage and cultural meaning, the professor refused to apologize or even acknowledge the issue, and the student dropped the class. *See id.* Further, the University has subjected Latino student groups to greater levels of surveillance than predominantly white groups. *See* Michigan Daily On-Line, *A Discriminatory Union: Police Must Patrol All Events Equally* (Nov. 22, 1999) ("[E]vents targeting specifically black or Latino/a students have been monitored with a much stronger [University] police presence than those dominated by white students. In addition, these students are often subjected to wristband and ID verification and sometimes have to leave via the side door rather than the front."); Bernal Dep., at 26-27. Furthermore, the University has failed to prevent discrimination against Latinos by other students. Current Latino students and recent graduates have recorded incidents such as being subjected to racial slurs (e.g. "spic") and racist jokes by teammates and classmates; white students dressing up as "Mexican gangsters" for Halloween; and white students avoiding seats next to students of color. *See* Expert Report of Joe R. Feagin, at 18-22 (sharing results of student focus group sessions) (filed with district court); Bernal Dep., at 26. In sum,

the University has engaged in both active discrimination against Latinos through the conduct of its faculty and staff and passive discrimination against Latinos through its failure to mitigate the hostile racial climate on campus.

2. *Continued Discrimination in Admissions*

In addition to the discrimination described above, one cannot ignore that, absent the consideration of race as a plus factor, the University's current admissions policy would further discriminate against Latinos and other ethnic/racial minorities. Under the current policy, admissions counselors evaluate applicants based on their selection index score, which is determined by the number of points the applicant receives (up to a possible total of 150) based on academic and other factors. Thus, in addition to the points awarded an applicant for his or her high school grade point average ("GPA") and score on one of two standardized tests (ACT or SAT), the University assigns a number of points based on several "SCUGA" factors.[24] Four of the five "SCUGA" factors—"S," "C," "G" and "A"—have a clear and demonstrable discriminatory effect on Latino and other minority applicants to the University. Specifically, because each of these factors are far more likely to enhance the selection index point totals of white applicants than those of their Latino and African American counterparts, their use, unless balanced by the consideration of race as a plus factor, renders minority applicants less competitive in the admissions process.

As demonstrated by the University's own admissions data for the years 1995 through 1998, the "S" and "C" factors negatively affect the applications of a disproportionate number of Latino and other minority students.[25] For example, as a result

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24. The term "SCUGA" refers to the following factors employed in the admissions process: school ("S"), curriculum ("C"), unusual ("U"), geographic ("G") and alumni ("A").

25. The University assigns up to ten "S" factor points based on the number of Advanced Placement ("AP") or International Baccalaureate ("IB") courses offered by the school, the school's average

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of past and ongoing racial segregation in housing and education, Latino high school students are far more likely than their white counterparts to attend schools that do not offer AP or IB courses. *See* Preliminary Expert Witness Report of Dr. Trent ("Trent Expert Rpt.") at 8 (finding that 29% of Latino students in the Detroit area attend schools offering no AP/IB courses, whereas only 4% of white students in the same area attend such schools) (filed with district court). This disadvantages minority applicants in two ways. First, because the University rates secondary schools, in part, based on the number of AP or IB courses they offer, minority applicants receive less benefit from the "S" factor than their white counterparts. Expert Witness Report of Dr. Jacob Silver and Dr. James Rudolph ("Silver/Rudolph Expert Rpt.") at 13-14 (filed with district court). This discriminatory effect is then compounded by the fact that the same minority students also receive less benefit from the "C" factor, which is based, in part, on the number of AP or IB classes taken by the applicant. Trent Expert Rpt. at 6. Thus, simply as a result of the secondary schools they attend, and regardless of how they perform at those schools, Latino and other minority students are precluded from earning "S' and "C" points available to white applicants.

The "G" and "A" factors have a similarly severe discriminatory impact on Latino applicants.[26] The "G" factor awards extra points to students who come from one of forty-five northern Michigan counties that are under-represented at the University. These counties are overwhelmingly white. In fact, less than one percent of the residents of these counties

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SAT score and the percentage of the school's students that attend college. Joint Appendix filed by parties in Court of Appeals ("JA") at 1118, 1148-49. The "C" factor calls for an award of between negative four and positive eight points based on the strength of the curriculum taken by the applicant. *Id.*

26. The selection index allows for two, six, or ten points to be awarded for geographic residence ("G") and one or four points to be awarded for alumni relationships ("A"). JA at 1118, 1150-51.

are Latino or African American. Trent Expert Rpt. at 7; Silver/Rudolph Expert Rpt. at 14-15. Similarly, given that Latinos historically have had virtually no presence at the University, the "A" factor, which awards points to applicants related to graduates of the University, necessarily perpetuates low Latino representation on campus. Trent Expert Rpt. at 8. In fact, the record demonstrates that approximately seventy-five percent of the students admitted with alumni relationships were white, whereas only three percent of such students were Latino. Trent Expert Rpt., Table 6.[27]

The severe discriminatory effect produced by the factors discussed above is particularly troubling given that these considerations add little, if anything, to the ability of an admissions officer to determine which applicants are most deserving of admission. For example, it is not inherently true that an applicant from an under-represented northern Michigan

27. The discriminatory impact produced by the "SCUGA" factors is compounded by the University's reliance on standardized tests in determining admission. Statistics show that Latino and African American high school students do not perform as well on standardized tests as their white counterparts, and, in fact, the gap is widening. The College Board, *2001 College Board Seniors Are the Largest, Most Diverse Group in History*, Table 9, *available at* http://www.colegeboard.com/press/article/0,3183,10429,00.html; *ACT Average Composite Score Steady for Fifth Straight Year*, *available at* www.act.org/bews/releases/2001/08-15-01.html; *Schools Blamed for Racial Gap in SAT Scores*, August 28, 2001, *available at* http://www.cnn.com/2001/fyi/teachers.ednews/08/28/sat.scores/index.html. Moreover, despite their widespread use, several studies indicate that both the SAT and ACT are poor predictors of academic performance in college, especially for Latino students. *See, e.g.*, Jonathan Baron and M. Frank Norman, *SATs, Achievement Test, and High School Class Rank as Predictors of College Performance*, 52(4) Educational and Psychological Measurement 1047, 1049, 1054 (1992); Christina Perez, *"The Truth Behind the Hype: A Closer Look at the SAT,"* Paper Presentation, 2002 NEACAC Conference, Fairfield University; Barbara Z. Pearson, *Predictive Validity of the Scholastic Aptitude Test (SAT) for Hispanic Bilingual Students*, 15(3) Hispanic Journal of Behavioral Sciences 342 (1993).

county or one whose parents attended the University (both of whom are likely to be white) is more deserving of admission or will contribute more to the University than a minority applicant from inner-city Detroit whose parents did not attend college. In addition, although one can understand the University's desire to distinguish between applicants with similar grades from different schools, there is no evidence in the record that the "S" factor, as measured by the University, is a useful predictor of student performance in college.

Furthermore, it is difficult, if not impossible, to argue that Michigan was unaware of the discriminatory impact of these factors at the time it adopted its current admissions program in 1998. As discussed *supra*, the University's own admissions data for the years 1995 through 1998 demonstrated that the "S," "C," "G" and "A" factors combine to produce a significant discriminatory effect on Latino and other minority applicants. The University nonetheless found these factors to be important, indeed necessary, in selecting an incoming class. The University's concurrent decision to balance the discriminatory effect they produce through the consideration of race should thus be respected.

CONCLUSION

Both including the unique life experience of Latinos for the benefit of all students and remedying the continuing effects of the aforementioned discrimination present compelling reasons for the University's modest consideration of race in its admissions program. Depriving educational institutions of this essential tool will not only bring further harm to the Latino community, but will impede the efforts of the state to cope with the increasing educational gap between the majority and its largest minority.

Respectfully submitted,

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APPENDIX

APPENDIX — *AMICI* STATEMENTS OF INTEREST

American GI Forum of the United States

The AGIF is the only Hispanic congressionally chartered veterans family organization with more than 500 chapters in the United States and Puerto Rico. The AGIF has been actively involved with veterans' issues, education and civil rights since 1948. Our outreach and educational programs promote pride, Hispanic recognition and accomplishment; provide leadership, networking opportunities, scholarships and educational attainment, and employment training and advancement.

Association of Hispanic Health Care Executives

The Association of Hispanic Healthcare Executives (AHHE) is dedicated to promoting access to healthcare for the Hispanic community. With a mission of promoting the availability and development of healthcare executives dedicated to enhancing the quality of and access to healthcare for the Hispanic community in the United States, we also are a founding member of the Institute for Diversity in Health Management, a subsidiary of the American Hospital Association. The Association of Hispanic Healthcare Executives was founded in 1988 as a national voluntary organization seeking to foster programs and policies to increase the presence of Hispanics in health administration professions. You can view our programs and activities by visiting our website: www.AHHE.org.

Association of Latin American Law Students

The Association of Latin American Law Students is dedicated to fostering the involvement of Latin Americans in the legal profession, as well as advocating for the needs of Latin American law school students. This dedication is evident in our mission and in the other programs ALALS provides to the law school community.

Appendix

Chancellor's Committee on the Status of Latinos (CCSL), University of Illinois, Chicago

Our organization supports Affirmative Action and the brief. We are the main campus organization of faculty and staff with student representation that addresses issues of concern to the Latino community on campus, including issues of recruitment and retention of Latino students.

Cuban American National Council, Inc.

CNC is the largest U.S. non-profit Hispanic organization developing affordable housing for low-income seniors, and is a pioneer in providing alternative education to at-risk students. Other Council programs include daycare and developmental services for infants/toddlers of adolescent mothers, and employment and training services for unskilled, undereducated recent immigrants, and individuals who face an English language barrier.

We support the University of Michigan admission policy because it helps Latino & other minorities take advantage of education opportunities they could not otherwise.

This or similar policy(s) are necessary in the face of thousands of cases of discrimination against minorities in the United States, and the disadvantages of Latinos vis-à-vis other social groups regarding education, income, college graduate rates, and others.

Dominicans 2000, Inc.

Dominicans 2000 is a non-profit organization established to implement projects designed to address the advancement of Dominicans and the progress of Latinos and others in the United States. The means of providing such advancement includes, creating networks, organizing forums and forming committees to conduct research and implement programs.

Appendix

An affirmative action program creates opportunities for individuals who otherwise would not be able to attend college. As an organization that assists young Latinos through the application process for colleges and universities, D2000 supports the creation and implementation of affirmative action policies that truly create opportunities for youth of color.

Dominican-American National Roundtable

The Dominican-American National Roundtable (DANR) is a non-partisan, non-profit corporation seeking to bring together the different voices of all people of Dominican origin in the United States. DANR is a national forum for analysis, planning, and action to advance the educational, economic, legal, social, cultural, and political interests of Dominican Americans. DANR aims to ensure for U. S. Dominicans the full exercise of the rights and freedoms guaranteed in the Constitution of the United States of America. With those objectives in mind, DANR is committed to enriching the quality of life in the United States by highlighting the contributions of Dominicans to the larger American society.

Hands On New York

As requested, Hands On New York, Inc. was formed exclusively to provide services that will improve the quality of life for low-income individuals and families in New York City.

We strongly believe that Affirmative Action is one of the greatest plans created by mankind because it allows minorities the opportunities that otherwise would have never been given. Affirmative Action must be maintained "By Any Means Necessary." It's the future of millions of minorities.

Hispanic Association of Colleges & Universities (HACU)

The Hispanic Association of Colleges and Universities (HACU) has championed the higher education success of the nation's youngest and largest ethnic population. The formal mission of HACU is to promote the development of member colleges and universities; improve access to and the quality of postsecondary educational opportunities for Hispanic students; and, to meet the needs of business, industry and government through the development and sharing of resources, information and expertise.

A decision against college admissions policies in place since the landmark Supreme Court *Regents of the University of California v. Bakke* decision in 1978 would create an immediate crisis for Hispanics, who already suffer the lowest college entrance and completion rates among all major U.S. population groups. HACU supports the University of Michigan in promoting diversity in college admissions policies.

Labor Council for Latin American Advancement (LCLAA)

"The Labor Council for Latin American Advancement (LCLAA) is a national organization representing the interests of approximately 1.7 million Latinos trade unionists in the United States and Puerto Rico. Founded in 1973, LCLAA builds coalitions between the Latino community and Unions in order to advance the civil, economic and human rights of all Latinos.

Numerous surveys and studies show the most common occupations for Latinos as service workers, precision production, and transportation. Latinos continue to occupy the lowest sector jobs and non-management positions due to an inability to access the educational resources to improve

the lives of their families. Race, gender, language and ethnic discrimination coupled with an inability to access the necessary academic resources to improve their economic standing continue to act as a barrier to acquiring high skilled professional and management necessary to help their children access higher education. Our society's professional workforce should be reflective of the population it serves. As 13% of the U.S. population, Latinos should have a fair and equitable opportunity to serve society's needs in professional and management positions.

Labor Council for Latin American Advancement (LCLAA)-Massachusetts Chapter

LCLAA is an AFL-CIO constituency group that represents the interests of the Latino community to organized labor and to public officials. Affirmative action has and will be a direct benefit to our membership and families.

Latino Honor Society

The Latino Honor Society, a student association of the Borough of Manhattan Community College, is in support of the affirmative action policies currently in place protecting the rights of underprivileged individuals.

Latino Issues Forum

Latino Issues Forum is a non-profit public policy and advocacy institute committed to advancing the interests of Latinos, including Mexican-Americans, in higher education, economic development, health care, public policy planning, and consumer protections in telecommunications, energy and preventing insurance redlining, fraud and marketing abuse. Its Board of Directors represents a cross-section of the Latino community, including nationally recognized Latino leaders,

organizational presidents, legal and academic scholars, community leaders and private sector executives. Latino Issues Forum has a particular concern with this case because of its impact on diversity in institutions of higher education.

League of United Latin American Citizens (LULAC)

The League of United Latin American Citizens is the largest and oldest Hispanic membership organization in the United States. With over 115,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans. For more than 73 years, LULAC's members have sought increased opportunities in higher education for Hispanic students through the desegregation of public schools, reaching parity in school funding, the provision of scholarships, educational counseling and strong affirmative action programs. We believe that affirmative action programs like those in place at the University of Michigan are essential to overcoming the tremendous obstacles that college-bound Latino students are faced with.

National Association for Bilingual Education (NABE)

NABE is a non-profit national membership organization founded in 1975 to promote educational excellence and equity for language minority students. NABE supports programs that teach children with limited English proficiency, English while helping them attain continued academic excellence.

National Association of Latino Elected and Appointed Officials

The National Association of Latino Elected and Appointed Officials was established in 1976 to promote the full

participation of Latinos in the civic life of the United States. NALEO is a national non-profit membership organization whose members include officials from all parties and levels of government and their supporters. NALEO is committed to ensuring that all Americans have the opportunity to realize their full potential, which requires unhindered access to education and employment.

NALEO believes that affirmative action, properly implemented, is neither a system of mandatory quotas or set-asides, or the granting of preferences to unqualified people. NALEO believes affirmative action is about opening up the system to all and providing a climate where all persons have a chance to succeed according to their efforts and abilities. Opening the system in this fashion often requires recruitment and training efforts, especially for those historically denied opportunity.

National Conference of Puerto Rican Women (NACOPRW)

NACOPRW as a non-profit/non partisan organization that promotes the full participation of Puerto Rican women and other Hispanics in the social, economic, political life in the U.S., we support this affirmative action amicus brief.

National Council of La Raza

The National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy.

NCLR recognizes that if the University of Michigan's affirmative action admissions policies are found unconstitutional, the nation's minorities will be denied equal opportunities to institutions of higher education and consequently, lifelong opportunities. NCLR stands in support of Affirmative Action policies not only for the sake of minority communities, but also for the sake of a better United States.

National HEP-CAMP Association

The National HEP-CAMP Association represents the High School Equivalency Programs and College Assistance Migrant Programs across the country. HEP helps migrant students who have dropped out of high school get their GED. CAMP assists migrant students in their first year of college with academic, personal, and financial support. The Association recognizes the invaluable role that affirmative action has played in providing access to postsecondary education for the community that we serve. Our students are among the most educationally disadvantaged groups in the nation. Moving from school to school, state-to-state, migrant students are often unable to demonstrate the same academic credentials of their more advantaged peers. Nevertheless, as our programs demonstrate, given the access to education, migrant youth are capable of achieving to the highest levels. Outlawing affirmative action would place yet another barrier to a better future through education before our students. Percentage plans are a particularly poor option for migrants, as our youth change schools frequently, and thus, are unlikely to qualify for the top percentage spots in their schools.

National Hispanic Council on Aging

The NHCoA is a network of advocate organizations. It is a community-building network designed to improve the lives

of older Latinos, families & communities. Older Latinos education levels are extremely low therefore levels of poverty are extremely high. Education is the one avenue of opportunity to get out of the cycle of poverty, illiteracy and dependence. Education must begin early in life - affirmative action is crucial for our communities to get out of the "working poor" category.

National Hispanic Medical Association/ Hispanic-Serving Health Profession Schools

The National Hispanic Medical Association/ Hispanic-Serving Health Profession Schools' mission is to improve the health of Hispanics and other underserved groups. It chooses to support the affirmative action amicus briefs to continue to increase diversity in education and to increase opportunities for Hispanics to join the medical profession, which eventually leads to, expanded access to health care in the U.S. and to improved health of the nation.

National Puerto Rican Coalition, Inc.

NPRC is a national non-profit organization representing the interests of over 7 million Puerto Rican U. S. citizens on the mainland and in Puerto Rico. NPRC's mission is to systematically strengthen and enhance the social, political and economic well being of Puerto Ricans throughout the United States and in Puerto Rico, with a special focus on the most vulnerable.

NPRC is very concerned about the under-representation of Puerto Ricans/Latinos in colleges and universities in the U. S.

National Puerto Rican Form, Inc.

National Puerto Rican Forum Inc. is a 46 year-old Community Based Organization whose mission is to improve the socio-

economic condition of Latinos and other minorities through education and employment.

From our vantage point, we see and deal with the outcomes of the education system when it fails. We believe that affirmative action is an excellent tool to equip all people, especially minorities, with the skills necessary to overcome barriers to full participation in the great American enterprise.

Nosotros

The Latino arts organization NOSOTROS founded by actor Ricardo Montalban supports affirmative action in that college trained performing artist of color need to learn and develop their talents and have access to the arts institutions of higher education as a necessary part of their development.

PR Project, Inc.

PR Project, Inc. is a multimedia organization that leverages new media technologies for the benefit of the Latino community and its artists. We are interested in having our children enter schools that will provide them with the best education, skills and networking opportunities the finest schools in this country offer. It is in the interest of the United States as a whole to guarantee that all our young men and women are given opportunities to discover and develop their talents without regard to race, ethnicity, class, religion or gender. PR Project, Inc. is committed to affirmative action and the good results it historically has produced.

Puerto Rican Legal Defense and Education Fund (PRLDEF)

Through litigation, policy analysis and education, the Puerto Rican Legal Defense and Education Fund (PRLDEF) works to secure, promote and protect the civil and human rights of the Puerto Rican and wider Latino community.

Established in 1972, the Puerto Rican Legal Defense and Education Fund, a privately funded 501(c)(3) nonprofit and nonpartisan organization, accomplishes its work through its three program divisions: Litigation, Education and, as a result of our merger with the Institute for Puerto Rican Policy (IPR), the new Policy Division.

United States Hispanic Chamber of Commerce (USHCC)

The United States Hispanic Chamber of Commerce (USHCC) advocates, promotes and facilitates the success of Hispanic businesses throughout the United States and Puerto Rico. Being the leading proponent of Hispanic-owned businesses, the USHCC supports the position of the University of Michigan and to uphold its policies of affirmative action in both its undergraduate and graduate programs. The elimination of these programs will ultimately damage the future workforce of this country.

United States Hispanic Chamber of Commerce (USHCC) Foundation

The United States Hispanic Chamber of Commerce (USHCC) Foundation is committed to giving Latino youth alternatives for life preparation and life-long learning by developing and implementing initiatives and educational campaigns to awaken and nurture the entrepreneurial spirit of Latino youth. To fulfill this mission, the USHCC Foundation builds alliances, partnerships and collaborative efforts to link Latino youth to educational programs that will develop and enhance their critical thinking and entrepreneurship skills.

With the elimination of affirmative action programs in both undergraduate and graduate schools, fulfillment of the Foundation's mission will not be possible. This elimination will severely effect the educational attainment, advancement

and future success of our Latino youth and the economic prosperity of this nation. The USHCC Foundation strongly supports the position of The University of Michigan. national economic agenda.